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First report on State responsibility

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Introduction

A. Outline of the work of the Commission on State responsibility

1. The subject of State responsibility was one of the 14 topics originally selected by the Commission for "codification and progressive development" in 1949.[1] Work began in 1956 under Mr. Garcia-Amador as Special Rapporteur. It focused on State responsibility for injuries to aliens and their property, that is to say on the content of the substantive rules of international law in that field. Although Mr. Garcia-Amador submitted six reports between 1956 and 1961, the Commission barely discussed them, because of the demands of other topics, including diplomatic immunities and the law of treaties. It was also felt that the disagreements over the scope and content of the substantive rules relating to the protection of aliens and their property were such that little progress was likely to be made.

2. Thus the Commission reconsidered its approach to the topic. In 1962, an intersessional subcommittee, chaired by Mr. Roberto Ago, recommended that the Commission should focus on "the definition of the general rules governing the international responsibility of the State".[2] It added that, in doing so,

> "there would be no question of neglecting the experience and material gathered in special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility."[3]

In 1963, the Commission approved the proposed definition and appointed Mr. Ago Special Rapporteur.

3. Between 1969 and 1980, Mr. Ago produced eight reports, together with a substantial addendum to the eighth report, produced after his election to the International Court of Justice. During that time, the Commission provisionally adopted 35 articles, together making up part one of the proposed draft articles ("Origin of State responsibility").

4. In 1979, following the election of Mr. Ago to the International Court, Mr. Willem Riphagen was appointed Special Rapporteur. Between 1980 and 1986, he presented seven reports, containing a complete set of draft articles on part two ("Content, forms and degrees of international responsibility") and part three ("Settlement of disputes") together with commentaries. Owing to the priority given to other topics, however, only five draft articles from part two were provisionally adopted during this period.

5. In 1987, Mr. Riphagen being no longer a member of the Commission, Mr. Gaetano Arangio-Ruiz was appointed Special Rapporteur. In the period 1988-1995, he presented seven reports. The Drafting Committee dealt with the remainder of parts two and three in the quinquennium 1992-1996, enabling the Commission to adopt the text with commentaries on first reading. No attempt was made, however, to reconsider any issues raised by part one of the draft articles. The coordination of articles in the different parts was left to the second reading.

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[1] *Yearbook of the International Law Commission, 1949*, p. 281.

[2] *Yearbook ... 1963*, vol. II (Part One), document A/CN.4/152, p. 228, para. 5.

[3] Ibid.

6. At its forty-ninth session in 1997 (Mr. Arangio-Ruiz having ceased to be a member), the Commission adopted a provisional timetable which envisaged a two-track process, with the aim of completing the second reading by the end of the quinquennium, i.e. by 2001. This process would involve reports by a Special Rapporteur, together with a series of working groups to consider major unresolved issues. Three such issues were tentatively identified as requiring special consideration: international crimes, the regime of countermeasures and the settlement of disputes.[4]

B. Scope of the present report

7. The present report deals first, in the introduction, with a number of preliminary and general issues as to the scope and form of the draft articles. Chapter I[5] discusses what has so far proved the most controversial aspect of the draft articles as a whole: the distinction drawn in article 19 between international crimes and international delicts. This is perhaps the most striking way in which the draft articles sought to deal with "the possible repercussions which new developments in international law may have had on responsibility" (see para. 2 above). Chapter II[5] undertakes the task of reviewing and, where necessary, revising the draft articles in part one (other than article 19). It makes specific proposals, taking into account the comments of States and developments in doctrine and practice since the adoption of part one.

C. Comments received so far on the draft articles

8. Before turning to the substance, a word should be said about comments of Governments on the draft articles. A few written comments were received on part one in the period 1980-1988.[6] More recently, the General Assembly invited comments on the draft articles as a whole. Eighteen Governments have so far responded. [7]Many Governments have also commented on the evolution of particular draft articles in the course of the debate in the Sixth Committee on the work of the Commission, and these comments will also, as far as possible, be taken into account. The Special Rapporteur would welcome further comments both on the draft articles and on the proposals contained in the present report.[8]

9. Comments of Governments so far fall essentially into two categories. The first consists of comments on the draft articles as a whole, with observations on the overall economy of the text, or proposing the deletion of certain topics or issues, or, less often, the inclusion of new topics. These raise a number of general issues, some of which are discussed below. The second group includes comments on particular issues. They will be dealt with as necessary in the discussion of the relevant draft articles.

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[4] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10, paras. 30 and 161).

[5] Chapters I and II will appear as addenda to the present document.

[6] See *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1-4; *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4; *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/351 and Add.1-3; *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/362; and *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/414.

[7] See A/CN.4/488 and Add.1-2.

[8] In addition several non-governmental bodies are contributing comments, including the International Law Association (which is establishing a working group), a panel of Japanese scholars nominated by the Japanese Government and a panel of the American Society of International Law.

D. Some general issues

10. A number of comments discuss the balance between codification and progressive development in the draft articles. This is an important and perennial issue for the Commission. But one difficulty is that discussions in these terms tend to be rather impressionistic and risk substituting debate about generalities for attention to the particular provisions. At the current stage it is sufficient to note the suggestion made (e.g. by France, and impliedly by the United States of America and the United Kingdom of Great Britain and Northern Ireland) that the draft articles err on the side of "progressive development", in a way that is likely to be counter-productive and unacceptable to States.[9] Other comments take a more positive line (e.g. Italy, Uzbekistan, Czech Republic, Argentina, Nordic countries). But the overall balance of the draft articles can only be assessed after the second reading process is further advanced.

11. Certain general issues do warrant some discussion at this stage. They are:

(a) The distinction between "primary" and "secondary" rules of State responsibility;

(b) Issues excluded from the draft articles or insufficiently developed;

(c) The relationship between the draft articles and other rules of international law;

(d) The inclusion of detailed provisions on countermeasures and dispute settlement;

(e) The eventual form of the draft articles.

1. Distinction between "primary" and "secondary" rules of State responsibility

12. As noted above, the Commission initially approached the subject by considering the substantive law of diplomatic protection (protection of the persons and property of aliens abroad). But it became clear that this area was not ripe for codification. A decision to return to certain aspects of the topic, under the rubric of "Diplomatic protection", was only made in 1997; at the same time it was decided to focus largely on the secondary rules applicable to that topic.[10] The issue of potential overlap with the draft articles on State responsibility will need to be kept under review.

13. When it reconsidered the issue in 1962-1963, the Commission saw the present topic as concerning "the definition of the general rules governing the international responsibility of the State", by which was meant responsibility for wrongful acts. The emphasis was on the word "general". The draft articles were to concern themselves with the *framework* for State responsibility, irrespective of the content of the substantive rule breached in any given case. The distinction between "primary" and "secondary" rules was formulated by Special Rapporteur Ago as follows:

> "The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. Consideration of the various kinds of obligations placed on States in international law and, in particular, a grading of such obligations according to their importance to the international community, may have to be treated

[9] See A/CN.4/488, part II (Comments and observations received from Governments), "General remarks", comments by France, sixth and seventh paragraphs.

[10] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 30, 158-161.

as a necessary element in assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of a successful codification of the topic."[11]

14. The distinction between primary and secondary rules has had its critics. It has been said, for example, that the "secondary" rules are mere abstractions, of no practical use; that the assumption of generally applicable secondary rules overlooks the possibility that particular substantive rules, or substantive rules within a particular field of international law, may generate their own specific secondary rules, and that the draft articles themselves fail to apply the distinction consistently, thereby demonstrating its artificiality.

15. On the other hand, to abandon the distinction, at the current stage of the work on the topic, and to search for some different principle of organization for the draft articles, would be extremely difficult. It would amount to going back to the drawing board, producing substantial further delays in the work. Moreover, it is far from clear what other principle of organization might be adopted, once the approach of selecting particular substantive areas for codification (such as injury to aliens) has been abandoned. The point is that the substantive rules of international law, breach of which may give rise to State responsibility, are innumerable. They include substantive rules contained in treaties as well as in general international law. Given rapid and continuous developments in both custom and treaty, the corpus of primary rules is, practically speaking, beyond the reach of codification, even if that were desirable in principle.

16. Indeed the distinction has a number of advantages. It allows some general rules of responsibility to be restated and developed without having to resolve a myriad of issues about the content or application of particular rules, the breach of which may give rise to responsibility. For example, there has been an extensive debate about whether State responsibility can exist in the absence of damage or injury to another State or States. If by damage or injury is meant economically assessable damages, the answer is clearly that this is not always necessary. On the other hand in some situations there is no legal injury to another State unless it has suffered material harm.[12] The position varies, depending on the substantive or primary rule in question. It is only necessary for the draft articles to be drafted in such a way as to allow for the various possibilities, depending on the applicable primary rule. A similar analysis would apply to the question whether some "mental element" or *culpa* is required to engage the responsibility of a State, or whether State responsibility is "strict" or even "absolute", or depends upon "due diligence".

17. There remains a question whether the draft articles are sufficiently responsive to the impact that particular primary rules may have. The regime of State responsibility is, after all, not only general but also residual. The issue arises particularly in relation to article 37 of part two ("*Lex specialis*"). It is discussed below.

18. Finally, there is a question whether some of the articles do not go beyond the statement of secondary rules to lay down particular primary rules. This is true, at least apparently, for the definition of "international crimes" in article 19, and especially paragraph 3. Article

[11] *Yearbook ... 1970*, vol. II (Part Two), p. 306, para. 66 (c).

[12] See, e.g., *Lake Lanoux Arbitration, United Nations Reports of International Arbitral Awards*, vol. 12 (1956), p. 281.

19, however, raises broader issues, which are discussed in Chapter I below. Another article which, it has been suggested, infringes the distinction between primary and secondary rules is article 35, dealing with compensation in cases where the responsibility of a particular State is precluded by one of the circumstances dealt with in articles 29 to 34.[13] On the other hand article 35 is a without prejudice clause, and does not specify the circumstances in which such compensation may be payable. It can be argued that it thereby usefully qualifies the "circumstances precluding wrongfulness" in articles 29 to 34 – although whether it is equally applicable to each of those circumstances is a question to which it will be necessary to return.

2. Issues excluded or insufficiently developed

19. Many of the comments made so far with regard to the scope of the draft articles relate to issues which should be excluded (e.g. international crimes, countermeasures, dispute settlement). But a number of topics have been identified which require further treatment. For example, the provisions dealing with reparation, and especially the payment of interest, have been said to be inadequately developed.[14]

20. Another such issue is obligations *erga omnes*. Since its well-known dictum in the *Barcelona Traction* case,[15] the International Court has repeatedly referred to the notion of obligations *erga omnes*, most recently in its Order of 17 December 1997 on the admissibility of Yugoslavian counter-claims in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (para. 35). The matter is presently dealt with in the definition of "injured State" in article 40, where it is linked to the concept of international crimes.

21. Comments of Governments on obligations *erga omnes* are very varied.

22. France is generally critical of the notion, while not denying that in special circumstances a State may suffer legal injury merely by reason of the breach of a commitment. However, it says that "in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule."[16] This may appear to deny the possibility of obligations *erga omnes*, whose very effect, presumably, is to establish a legal interest of all States in compliance with certain norms.

23. Germany, by contrast, sees in the clarification and elaboration of the concepts of obligations *erga omnes* and *jus cogens*, in the field of State responsibility, a solution to the vexed problems presented by article 19.[17]

24. The United States takes an intermediate position, supporting the clarification and in some respects the narrowing of the categories of "injured State" in article 40, especially in relation to breaches of multilateral treaties, while accepting the notion of a general or community interest in relation to defined categories of treaty (e.g. human rights treaties). But it denies that injured States acting in the context of obligations *erga omnes* (or of an *actio popularis*) should have the right to claim reparation as distinct from cessation.[18]

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[13] See, e.g., A/CN.4/488, part II, article 35, comments by France.

[14] See, e.g., ibid., comments by the United States under article 3; fifth paragraph of the comments by France under "General remarks"; comments by Mongolia, under article 45.

[15] *I.C.J. Reports 1970*, at p. 32.

[16] A/CN.4/488, third paragraph of the comments by France under article 40.

[17] Ibid., comments by Germany under part two, chapter IV.

[18] Ibid., comments by the United States under article 19.

25. The United Kingdom likewise raises issues of the definition of "injured State" in the context of multilateral treaty obligations. In particular it questions the consistency of article 40, paragraph 2 (e) (ii), with article 60, paragraph 2 (c), of the Vienna Convention on the Law of Treaties, which allows the parties to multilateral treaties to suspend the operation of the treaty in relation to a defaulting State only if the treaty is of such a character that a material breach of its provisions by one party "radically changes the position of every party with respect to the further performance of its obligations under the treaty".[19]

26. These and related questions will be referred to in Chapter I of the present report, in the context of international crimes, and (depending on the decisions to be taken by the Commission as to the treatment of international crimes) they will be considered in more detail in relation to part two of the draft articles, and especially article 40.

3. Relationship between the draft articles and other rules of international law

27. This issue has already been referred to in the context of the distinction between primary and secondary rules. It is addressed in the introductory articles to part two, in particular articles 37 to 39. Of particular significance is article 37 ("*Lex specialis*"), which recognizes that States are normally free to regulate issues of responsibility arising between them by special rules, or even by "self-contained regimes", notwithstanding the general law of responsibility. A number of Governments have suggested that the *lex specialis* principle should be applied to part one as well.[20] In the Special Rapporteur's view, this suggestion has much to commend it. But there remains a question whether the relocation of article 37 would be sufficient to cope with the implications of "soft" obligations, e.g. obligations to consult or to report. This will be discussed when considering draft articles 37 and 38.

4. Inclusion of detailed provisions on countermeasures and dispute settlement

28. Apart from the question of international crimes, there is controversy about the inclusion of two other major elements in the draft articles, countermeasures and dispute settlement.

29. A number of Governments are strongly critical of the inclusion of detailed rules on countermeasures in the draft articles, although again there is a spectrum of views.

30. Some Governments accept the need for the inclusion of countermeasures as a circumstance precluding responsibility, at least as against the wrongdoing State (article 30), but deny that the detailed elaboration of a regime of countermeasures in part two is appropriate.[21]

31. Others accept that countermeasures should figure in the draft articles not only in article 30, but also in more elaborate form in part two. In some cases, however, they raise questions about the formulation of relevant articles, including questions of a fundamental kind.[22]

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[19] Ibid., comments by the United Kingdom under article 40, para. 2.

[20] Ibid., comments by Germany under "General remarks", comments by the United States under article 30; and comments by France under article 37.

[21] Ibid., comments by France under part two, chapter III; and comments by the United Kingdom, under article 30.

[22] Ibid., comments by the United States under article 30, and under part two, chapter III; comments by Germany under part two, chapter III; comments by Mongolia under part two, chapter III; comments by the Czech Republic under part two, chapter III, and under article 48; comments by Austria under part two, chapter III, and under article 48, para. 1; comments by Ireland under part two, chapter III; and comment by the Nordic countries under part two, chapter III. See also the detailed suggestions made in the alternative by France, under part two, chapter III, and article 48.

32. By contrast, a few regard countermeasures as outside the scope of the draft articles entirely, on the basis that they cannot excuse unlawful conduct and that they tend to exacerbate rather than prevent interstate disputes.[23]

33. A range of views is also expressed in relation to the issues of dispute settlement raised by part three. Of particular significance is the point that most disputes between States (including even some territorial disputes) can be presented as disputes about State responsibility. Any compulsory system of dispute settlement under the draft articles potentially becomes a general dispute settlement mechanism for inter-State disputes. No doubt preference can be given to any other third-party mechanism which the parties may have chosen. But except in specialized fields, there is no such mechanism for most States in most cases. Some Governments (e.g. Mexico, Italy, Mongolia) regard this as a reason for supporting and even strengthening part three. Others (e.g. United States, France) regard it as a reason for deleting it. Still others welcome some provision for dispute settlement but urge caution in its formulation (e.g. Germany, Czech Republic, Ireland, Nordic countries, Argentina).[24] It should be noted that this issue is intimately linked to the question of the form the draft articles should take, an issue discussed below.

34. A related question is whether the draft articles should incorporate procedural elements, such as references to the onus or standard of proof. In the normal practice of the Commission, such adjectival issues have been avoided, although occasionally a substantive rule is formulated in terms implying that it is to be read narrowly or by way of exception: e.g. the negative formulation in the 1969 Vienna Convention of certain grounds for challenging the validity of or terminating a treaty (see articles 46, 56, 62 (1)).

35. France, while opposing the inclusion of separate, and especially compulsory, provisions for the settlement of disputes, argues in favour of the inclusion of a range of procedural safeguards.[25] *A fortiori*, such presumptions or other safeguards would be in order in a set of articles which did properly include measures for compulsory dispute settlement. They would be of particular significance in relation to international crimes, if that notion is retained. The normal requirement that criminal conduct should be duly and fully proved against the entity in question must presumably apply to States, as it does to any other natural or legal person.

36. The draft articles do include some such provisions. For example, article 8 attributes to a State the conduct of persons acting in fact on its behalf if:

> "(a) *it is established that* such person or group of persons was in fact acting on behalf of that State;" (emphasis added).

37. Article 27 proscribes certain measures of aid or assistance to a wrongdoing State "if *it is established that* [the aid or assistance] is rendered for the commission of an internationally wrongful act carried out by the latter" (emphasis added). It is not clear why this formula is used in these articles and not others. For example, article 16, dealing with "Existence of a breach of an international obligation", is in neutral terms. It provides merely that:

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation."

[23] Ibid., comments by Mexico under article 30.

[24] Ibid., comments by the United States, Germany, Mongolia, France, the Czech Republic, Mexico, the United Kingdom and the Nordic countries under part three.

[25] Ibid., comments by France under part three.

38. There is a case for more systematic attention to such issues. This can best be done in the context of the overall issues of dispute resolution, which in turn depend to a great extent upon the eventual form of the draft articles.

5. The eventual form of the draft articles

39. A question of considerable strategic importance is whether the draft articles should be proposed as a convention open to ratification, or whether they should take some other form, e.g. a declaration of principles of State responsibility to be adopted by the General Assembly. The latter approach would have major implications for dispute settlement: a General Assembly resolution could not establish more than a facility for dispute resolution, and would be unlikely even to go that far.

40. The views of Governments so far range widely. Some (e.g. Mexico, Italy, Nordic countries) expressly or by implication favour a convention, since without one substantive provisions for dispute settlement are impossible. Others (e.g. United Kingdom, Austria) advocate a non-conventional form. One argument which is particularly stressed is that the process of subsequent debate and the possible non-adoption or non-ratification of a convention would cast doubt on established legal principles. Some Governments (e.g. United States, Czech Republic, Germany, France, Argentina) take no position at the current stage.[26]

41. The normal working method of the Commission is to prepare its proposals in the form of draft articles, leaving it to the completion of the process to decide what form the text should take. The Special Rapporteur believes that the normal method has much to commend it, and that the case for departing from it has not been made *at the current stage*. Discussion of the eventual form of the draft articles is premature, at a time when their scope and content have not been finally determined. States unhappy with particular aspects of a text will tend to favour the non-conventional form, but the option of a declaration or a resolution should not detract attention from an unsatisfactory text. In other words, deferring consideration of the form of the instrument has the desirable effect of focusing attention on its content. The precedent of the Vienna Convention on the Law of Treaties is instructive. At one stage it was thought that the codification and progressive development of the law of treaties in the form of a treaty rather than a "restatement" was undesirable, and even logically excluded. Yet the Vienna Convention is one of the Commission's most important products, and it seems likely that it has had a more lasting and a more beneficial effect as a multilateral treaty than it could have had, for example, as a resolution or a declaration.

42. For these reasons, in the Special Rapporteur's view the question of the eventual form of the draft articles should be deferred for the time being. There will be occasion to return to it in the context of the treatment of the provisions on dispute settlement, at which stage the eventual scope of the draft articles with respect to such issues as crimes and countermeasures should be clearer.

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[26] Ibid., under "General remarks": sixth to eleventh paras. of comments by Austria; fourth para. of comments by France; last para. of comments by Mexico; sixth to eighth paras. of comments by the United Kingdom; and last para. of comments by the United States.